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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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NO. _____

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
5/3/2021
DEANA WILLIAMSON, CLERK

SHOLOMO DAVID **APPELLANT**

v.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-18-00059-CR**

**YVONNE ROSALES
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34th JUDICIAL DISTRICT**

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TRIAL COURT: 41st Judicial District Court, El Paso County, Texas, Honorable Anna Perez, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Yvonne T. Rodriguez, Justice Gina M. Palafox, and Justice Jeff Alley

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STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument in this case because the issues implicated in this petition have a substantial effect on what inferences juries can reasonably form in tampering-with-physical-evidence trials. Oral argument will be helpful to explain why and how the Court of Appeals erred by misapplying the legal-sufficiency standard, and will aid in the analysis of this Court's prior cases regarding that standard of review and the law applicable to the tampering-with-physical-evidence offense.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State charged Appellant, Sholomo David (hereinafter David), by indictment with the third-degree-felony offense of tampering with physical evidence. (CR 11).[1] The State further alleged that David had been finally convicted of two felony offenses, to wit: (1) assault on a public servant; and (2) harassment of a public servant. (CR 11). Following a jury trial occurring from March 23–27, 2018, the jury found David guilty of the charged offense, found the enhancement paragraphs true, and assessed punishment at 30 years' imprisonment. (CR 205). David filed a motion for new trial and a first amended motion for new trial, which were overruled by operation of law. (CR 239–40, 271–331). David timely filed his notice of appeal. (CR 249). On April 12, 2021, in a published opinion with one dissenting justice, the Eighth Court of Appeals reversed the trial court's judgment supporting David's conviction and rendered a judgment of acquittal. *See David v. State*, No. 08-18-00059-CR, —S.W.3d—, 2021 WL 1345679 (Tex. App.—El Paso Apr. 12, 2021, no pet. h.) (not yet reported). No motion for rehearing was filed in the Court of Appeals.

[1] Throughout this Petition, references to the appellate record will be made as follows: references to the clerk's record will be made as "CR" and page number, references to the reporter's record will be made as "RR" and volume and page number, and references to exhibits will be made as either "SX" or "DX" and exhibit number.

GROUNDS FOR REVIEW

GROUND FOR REVIEW ONE: By holding that the evidence was legally insufficient to establish David's identity as the individual who committed the offense when he was alone in a locked bathroom with the tampered-with evidence, the Court of Appeals erred by ignoring the circumstantial evidence establishing David's identity and requiring the State to disprove an alternative hypothesis regarding the offender's identity.

GROUND FOR REVIEW TWO: By holding that placing marijuana in a toilet bowl containing feces does not constitute "altering" or "destroying" within the meaning of the tampering-with-physical-evidence offense, the Court of Appeals failed to apply the appropriate legal-sufficiency standard by improperly substituting its judgment for that of the jury's and disregarding the jury's common-sense inference that marijuana that has been contaminated with feces has been altered or destroyed.

GROUND FOR REVIEW THREE: Even if the Court of Appeals did not err by holding that the evidence was legally insufficient to support David's conviction for tampering with physical evidence, the Court of Appeals erred by failing to reform the conviction to the lesser-included offense of attempted tampering with physical evidence, thereby violating this Court's instruction in *Thornton v. State*.

STATEMENT OF FACTS

The first and second issues before this Court are whether the Court of Appeals improperly applied the legal-sufficiency standard of review in determining that the evidence was legally insufficient to establish: (1) David's identity as the person who placed the marijuana in the toilet, even though agents discovered him alone in a locked bathroom as he was standing over a toilet containing marijuana and feces; and (2) that David altered or destroyed, within the meaning of the tampering-with-physical-evidence statute, the marijuana that agents found in a toilet bowl containing feces. The third issue is whether the Court of Appeals erred by failing to reform the judgment to reflect a conviction for attempted tampering with physical evidence, thereby violating this Court's instruction in *Thornton v. State*, 425 S.W.3d 289 (Tex. Crim. App. 2014). The facts relevant to these issues are accurately set forth in the Court of Appeals' opinion, *see David*, 2021 WL 1345679, at *1–3, as described below.

I. The offense.

After observing narcotics-related activity occurring in several rooms at a hotel located in El Paso, Texas, agents from the Texas Department of Public Safety executed search warrants on two of the rooms. (RR3 35, 55). As the agents moved down the hotel's hallway to execute the warrants, they observed a female enter

another room (for which the agents did not have a search warrant) and yell something to the room's occupants, and the door to the room was shut. (RR3 36, 38). As the agents approached the room, they heard voices and "a bunch of movements," such as shuffling sounds and the closing of a drawer, and the agents smelled the odor of marijuana coming from inside the room. (RR3 36, 38, 119). The agents knocked on the door and announced their identities as law-enforcement agents, but no one answered the door. (RR3 39, 119–20). Due to the possibilities that evidence might be destroyed or victims of human-trafficking could be present in the room, the agents breached the door. (RR3 39–41, 55).

Upon entering the room, the agents detected a strong odor of marijuana and observed two women inside the main area of the room. (RR3 42, 125). Another person, later identified as David, was in the hotel room's bathroom behind a locked door. (RR3 42). The agents ordered David to come out, but he refused. (RR3 122). After they heard shuffling and movement in the bathroom, the agents forced open the door and found David, who was fully dressed, standing between the shower and the toilet. (RR3 42, 122–23). As agents removed David from the bathroom, they observed a green leafy substance, which appeared to be marijuana, in the toilet. (RR3 61, 124–25; SX 16–17). One agent, Lieutenant Gabriel Nava, believed that David was the individual who tampered with the drug evidence, but Lieutenant Nava also

allowed for the possibility that one of the women in the hotel room could have placed the marijuana in the toilet, and thus all three room occupants were arrested for the offense. (RR3 67, 77–78). Lieutenant Nava testified that the agents were unable to test the marijuana "because there was fecal matter mixed into [the marijuana]." (RR3 67). Lieutenant Nava stated that although it was possible that the marijuana could have been tested, they did not attempt to retrieve the marijuana due to health concerns. (RR3 70).

II. Court of Appeals' opinion.

In a published opinion with one dissenting justice, the Eighth Court of Appeals reversed the trial court's judgment supporting David's guilt. *David*, 2021 WL 1345679, at *6. Specifically, the Court of Appeals held that the evidence was legally insufficient to establish: (1) David's identity as the person who committed the offense; and (2) that David "altered" or "destroyed" the marijuana, within the meaning of the tampering-with-physical-evidence statute, by placing it in a toilet bowl containing feces. *Id.* at *5–6. Moreover, the Court of Appeals considered and rejected the notion that it should have reformed the judgment pursuant to this Court's instructions in *Thornton*, 425 S.W.3d at 295, and *Rabb v. State*, 483 S.W.3d 16 (Tex. Crim. App. 2016), because "even if the evidence supported a finding that David intended to alter or destroy the marijuana, but failed, the evidence is legally

insufficient to [establish that] David was the individual who placed the marijuana in the toilet," and that this Court's instructions in *Thornton* and *Rabb* to reform the judgment to reflect a conviction for attempted tampering with physical evidence would thus be inapplicable. *David*, 2021 WL 1345679, at *6 n. 1. Having sustained David's legal-sufficiency issue, the Court of Appeals did not address David's remaining appellate issues. *David*, 2021 WL 1345679, at *6.

SUMMARY OF THE STATE'S ARGUMENT

This case has important implications regarding the jury's ability to consider circumstantial evidence and make common-sense deductions from that evidence in tampering-with-physical-evidence cases. In its published opinion, the Court of Appeals erred by misapplying the legal-sufficiency standard of review and improperly substituting its judgment for that of the fact-finder's, thus nullifying the jury's role as the sole determiner of the weight of the evidence and the credibility of the witnesses. Moreover, even if the Court of Appeals did not err by finding the evidence legally insufficient to establish the charged offense, because the State presented legally sufficient evidence to prove David's identity as the person who placed the marijuana in the toilet, the Court of Appeals erred by refusing to reform the judgment to reflect a conviction for attempted tampering with evidence, thereby ignoring this Court's instruction in prior cases.

First, the Court of Appeals erred by rejecting the circumstantial evidence establishing David's identity as the individual who placed the marijuana in the toilet. The evidence demonstrated that when the agents discovered the marijuana, David was alone and fully clothed in the locked bathroom, and he was standing next to the toilet where the marijuana was found. Through its verdict, the jury impliedly used this circumstantial evidence to make a common-sense inference that David placed

the marijuana in the toilet. By requiring the State to disprove the alternate hypothesis that one of the other occupants in the room placed the marijuana in the toilet, the Court of Appeals misapplied the legal-sufficiency standard and created an unreasonable burden on the State to prove identity in a tampering case only by direct evidence, such as by a testimony from a witness who directly observed the tampering occur.

The Court of Appeals also erred by rejecting the circumstantial evidence establishing that David "altered" or "destroyed" the marijuana by placing it in a toilet containing feces. Under this Court's jurisprudence, "alter" means that the defendant "changed or modified the thing itself," while "destroy" means "that a destroyed thing has been ruined and rendered useless." By placing the marijuana in a feces-contaminated toilet, David altered and/or destroyed the marijuana because the marijuana was also contaminated with fecal matter, and the marijuana could no longer be collected or tested. This conclusion is supported not only by a photograph showing the marijuana with obviously present feces in the toilet, but also by Lieutenant Nava's testimony that the marijuana was "mixed" with fecal matter and could not be collected due to health concerns. It stands to reason that if law-enforcement officers are unwilling or unable to even test such marijuana due to health risks, any rational jury could find that the marijuana was changed or rendered

useless because it could not be collected or tested, and that the marijuana was therefore altered or destroyed within the meaning of the offense. The Court of Appeals erred by concluding otherwise, and its opinion has the effect of placing the unreasonable burden on the State to present expert testimony or other evidence to establish that the chemical composition of the tampered-with evidence has changed, rather than relying on circumstantial evidence and the common-sense conclusions that juries are allowed to form from that evidence.

Finally, even if the evidence was legally insufficient to establish that David completed the charged offense by altering or destroying the marijuana, the Court of Appeals erred by refusing to reform the judgment to reflect a conviction for the lesser-included offense of attempted tampering with physical evidence. As explained above, there was legally sufficient evidence to establish David's identity as the person who placed the marijuana in the toilet, and even if the State failed to prove the alteration/destruction element of the offense, the Court of Appeals was required under this Court's opinion in *Thornton v. State* to reform the judgment to reflect a conviction for attempted tampering with evidence.

ARGUMENT AND AUTHORITIES

GROUND FOR REVIEW ONE: By holding that the evidence was legally insufficient to establish David's identity as the individual who committed the offense when he was alone in a locked bathroom with the tampered-with evidence, the Court of Appeals erred by ignoring the circumstantial evidence establishing David's identity and requiring the State to disprove an alternative hypothesis regarding the offender's identity.

> **REASON FOR REVIEW:** The Court of Appeals misapplied the legal-sufficiency standard of review by improperly substituting its judgment for the jury's regarding probative circumstantial evidence associated with the offense, which will unreasonably impede the State's ability to use circumstantial evidence to prove identity in tampering cases.

When determining whether the evidence is legally sufficient to support a criminal conviction, a reviewing court may not re-weigh evidence or substitute its judgment for that of the fact finder. *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018). Rather, a reviewing court "must give deference to the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (internal quotation marks and citation omitted). This standard applies to both direct and circumstantial evidence. *Id.* Moreover, circumstantial evidence is as probative as direct evidence, and circumstantial evidence alone can be sufficient to establish guilt. *Id.*

In this case, agents entered a hotel room with two women present in the main

area of the room, while David was in the bathroom behind a locked door. When the agents ordered David to come out, he refused. The agents then forced their way into the bathroom, and they saw David, who was fully clothed, standing next to the toilet that contained marijuana and feces. Nobody else was in the bathroom. The most rational, common-sense inference from this circumstantial evidence is that David, who was alone in the locked bathroom with the tampered-with evidence, was the person who placed the marijuana in the toilet.

Nevertheless, the Court of Appeals rejected this conclusion and held that the evidence did not establish David's identity as the person who committed the offense, reasoning that: (1) there were other individuals present in the hotel room who had "opportunity and access to the toilet"; (2) the agents did not directly observe David place the marijuana in the toilet; (3) David had only entered the hotel room minutes before officers entered the room; and (4) the jury's conclusion that David committed the offense by his "mere presence would… be an unreasonable inference, amounting to no more than mere speculation." *David*, 2021 WL 1345679, at *5.

By so concluding, the Court of Appeals misconstrued the distinction between a reasonable inference supported by evidence and an inference based on speculation. In *Hooper*, 214 S.W.3d at 16, this Court explained this distinction:

[A]n an inference is a conclusion reached by considering other facts

> and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt…. [J]uries are permitted to draw multiple reasonable inferences from the evidence (direct or circumstantial), but they are not permitted to draw conclusions based on speculation.

Hooper, 214 S.W.3d at 16. In so noting, this Court instructed intermediate courts of appeals to "adhere to the *Jackson* standard and determine whether the necessary inferences are based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Id*. at 16–17.

In *Hooper*, this Court also provided a useful illustration of the difference between reasonable inferences and unsupported speculation:

> A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her. Based on these two facts, it is reasonable to infer that the woman shot the gun (she is holding the gun, and it is still smoking). Is it also reasonable to infer that she shot the person on the floor? To make that determination, other factors must be taken into consideration. If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation. But, what if there is also evidence that the other guns in the room are toy guns and cannot shoot bullets? Then, it would be reasonable to infer that no one with a toy gun was the shooter. It would also be reasonable to infer that the woman holding the smoking gun

> was the shooter. This would require multiple inferences based upon the same set of facts, but they are reasonable inferences when looking at the evidence. We first have to infer that she shot the gun. This is a reasonable inference because she is holding the gun, and it is still smoking. Next, we have to infer that she shot the person on the floor. This inference is based in part on the original inference that she shot the gun, but is also a reasonable inference drawn from the circumstances.

Hooper, 214 S.W.3d at 16.

This case presents an almost-identical scenario to the above hypothetical: after agents heard shuffling noises behind a locked bathroom door and forced their way into the bathroom, David was found standing over the "smoking gun" while he was alone in the bathroom. Although it was possible that one of the other individuals in the room committed the offense by placing the evidence in the toilet before David entered the bathroom, the State was not required to disprove every reasonable alternative hypothesis to show that legally sufficient evidence established David's identity. *See Ramsey v. State*, 473 S.W.3d 805, 808 n. 3 (Tex. Crim. App. 2015) (noting that this Court has long since rejected the reasonable-hypothesis construct, which requires "every other reasonable hypothesis raised by the evidence [to be] negated" for a conviction to be upheld), *accord Zuniga*, 551 S.W.3d at 739. Moreover, a reasonable inference from the fact that David was found fully clothed was that he was not present in the bathroom to relieve himself, but that he was instead there to tamper with the marijuana.

Could any rational jury have found that, based upon the evidence when viewed in the light most favorable to the verdict, David committed the offense? Of course such a jury could have. Instead of permitting juries to make common-sense inferences based upon the evidence at trial, however, the Court of Appeals' opinion has the effect of placing the unreasonable burden on the State to not only prove that the defendant was alone when the evidence was tampered with, but also to provide testimony from a witness who directly observed him tamper with the evidence.

Thus, the Court of Appeals erred by: (1) substituting its determination of the weight of the evidence for that of the jury's; (2) requiring the State to disprove every reasonable alternative hypothesis regarding David's identity; and (3) rejecting the jury's rational, evidence-supported finding that David was the person who committed the offense. *See Zuniga*, 551 S.W.3d at 733; *Hooper*, 214 S.W.3d at 16–17; *see also Guillory v. State*, Nos. 09-18-00148-CR, 09-18-00149-CR, 09-18-00150-CR, 2020 WL 216034, at *1, 4 (Tex. App.—Beaumont Jan. 15, 2020, no pet.) (mem. op., not designated for publication) (holding that sufficient evidence supported the defendant's tampering-with-physical-evidence conviction where, *inter alia*, the police observed the defendant with cocaine residue on his hands alone in his bedroom, which was next to the bathroom where tampered-with evidence was located, and where the bathroom was only accessible through the bedroom). This

part of the Court of Appeals' opinion should thus be reversed.

GROUND FOR REVIEW TWO: By holding that placing marijuana in a toilet bowl containing feces does not constitute "altering" or "destroying" within the meaning of the tampering-with-physical-evidence offense, the Court of Appeals failed to apply the appropriate legal-sufficiency standard by improperly substituting its judgment for that of the jury's and disregarding the jury's common-sense inference that marijuana that has been contaminated with feces has been altered or destroyed.

> **REASON FOR REVIEW:** The Court of Appeals misapplied the legal-sufficiency standard of review by rejecting probative circumstantial evidence establishing that David altered or destroyed the marijuana by placing it in a toilet containing feces.

As it pertains to this case, a person commits tampering with physical evidence if, knowing that an offense has been committed, he alters, destroys, or conceals any thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense. TEX. PENAL CODE sec. 37.09(d)(1).

I. The State proved that David altered the marijuana.

On appeal, the State argued that the marijuana had been altered once it had been "wetted with toilet water mixed with fecal matter that the agents were unwilling and/or unable to collect." *David*, 2021 WL 1345679, at *5. Applying this Court's definition of "alter" from *Stahmann v. State*, 602 S.W.3d 573, 578–79 (Tex. Crim. App. 2020), the Court of Appeals rejected the State's argument, reasoning that:

> [T]he State failed to present any evidence from any witness or expert demonstrating the toilet water had indeed altered or destroyed the marijuana…. Common sense tells us that water does not necessarily alter everything it touches…. Whether the marijuana can be dried and used is an unanswered question. We cannot simply assume that it is unusable simply because it is repugnant that one would even attempt to do so.

David, 2021 WL 1345679, at *6; *see also Stahmann*, 602 S.W.3d at 578–79 (defining "alter," which lacks a statutory definition, to mean "that the defendant changed or modified the thing itself, not that he merely changed its geographic location.").

The Court of Appeals misconstrued *Stahmann*. There, this Court held that the defendant's act of throwing a prescription bottle over a fence did not constitute alteration because "the mere act of throwing a pill bottle did not change the bottle itself," but only resulted in a change of the pill bottle's location. *Stahmann*, 602 S.W.3d at 579–80. This case presents an entirely different scenario: David did not merely change the marijuana's geographic location by placing the marijuana in the toilet; rather, he changed or modified the marijuana itself because, mixed with fecal matter, the marijuana was no longer capable of being collected or tested. Moreover, Lieutenant Nava testified that the agents were unable to test this evidence due to the obvious health concerns associated with handling the marijuana, which had become "mixed" with fecal matter. Nevertheless, the Court of Appeals rejected this evidence

and improperly equated placing the marijuana in water that was obviously contaminated with fecal matter (as shown by State's Exhibit 17 and Lieutenant Nava's testimony) with placing the marijuana in sterile tap water. *See David*, 2021 WL 1345679, at *6.

Every person older than a toddler knows that fecal matter contains bacteria and other toxic substances, and that for health reasons it should not be touched, let alone ingested. A rational, common-sense inference from this evidence is that law-enforcement officers are unwilling or unable to handle and test feces-contaminated marijuana. Likewise, the jury could have rationally concluded that the marijuana had become inseparably combined with fecal matter, thus changing its nature. By placing the marijuana in the toilet, David intended to impair its verity, legibility, or availability as evidence in any subsequent investigation because it was altered and thus unsuitable for collection or testing. Through its verdict, the jury impliedly, and reasonably, found so, and the Court of Appeals erred by holding that legally insufficient evidence supported the alteration element of the offense. *See Stahmann*, 602 S.W.3d at 579–80; *see also Harris v. State*, No. 12-07-00279-CR, 2008 WL 2814879, at *3 (Tex. App.—Tyler July 23, 2008, pet. ref'd) (mem. op., not designated for publication) (holding that a defendant's act of chewing and swallowing marijuana constituted legally sufficient evidence of alteration and

destruction under section 37.09(d)).

II. The State proved that David destroyed the marijuana.

With somewhat-less explanation, the Court of Appeals also rejected the State's argument that David destroyed the marijuana within the meaning of section 37.09(d)(1). *David*, 2021 WL 1345679, at *5. But, David's act had the effect of ruining and rendering the marijuana useless. *See Williams v. State*, 270 S.W.3d 140, 146 (Tex. Crim. App. 2008) (defining "destroy" to mean "that a destroyed thing has been ruined and rendered useless."). In *Williams*, 270 S.W.3d at 146, this Court held that the defendant's act of smashing a crack pipe constituted destruction of evidence because it was "ruined and rendered useless when [he] stepped on it and broke it to pieces." This case is similar to *Williams*: as asserted above, David's act of placing the marijuana a toilet containing feces, thereby contaminating it, had the effect of ruining it and rendering it useless for collection and testing. Although the State did not present expert testimony establishing that the marijuana's chemical composition had changed, like the crack pipe in *Williams*, it was sufficient to show that it had been ruined and rendered useless by being contaminated with feces. *See Williams*, 270 S.W.3d at 146.

This case contrasts with *Rabb*, 434 S.W.3d at 617–18, where this Court held that the defendant's swallowing of a baggie of narcotics did not constitute

destruction because there was no evidence regarding the status of the baggie and "[the] act clearly does not cause the destruction of the drugs, or [the drugs] would be useless to the transporters." Here, Lieutenant Nava testified that the feces had become "mixed into [the marijuana]" and that they did not collect the marijuana due to health concerns; a rational inference from this testimony (and the photograph depicting the marijuana in the toilet) was that the marijuana's availability as evidence in the case had been impaired.

Through its everyday, common-sense experience, any rational jury could have reasonably found that feces-contaminated marijuana had been ruined and rendered useless by David's actions. Moreover, the burden should not be put on the State to present expert testimony in every tampering case to establish that the chemical composition of the evidence has changed when it is obvious that the evidence has been "altered" or "destroyed" within the meaning of section 37.09(d)(1).

For these reasons, the Court of Appeals also erred by rejecting the circumstantial evidence establishing that David altered or destroyed the marijuana and holding that the State had failed to prove that element of the offense. *See Williams*, 270 S.W.3d at 146, *cf. Rabb*, 434 S.W.3d at 617–18; *see also Harris*, 2008 WL 2814879, at *3. This part of the Court of Appeals' opinion should also be reversed.

<u>GROUND FOR REVIEW THREE</u>: Even if the Court of Appeals did not err by holding that the evidence was legally insufficient to support David's conviction for tampering with physical evidence, the Court of Appeals erred by failing to reform the conviction to the lesser-included offense of attempted tampering with physical evidence, thereby violating this Court's instruction in *Thornton v. State*.

> **<u>REASON FOR REVIEW</u>:** The Court of Appeals erred by refusing to reform the judgment supporting David's conviction to reflect a conviction for attempted tampering with evidence, thereby violating this Court's holding in *Thornton*, 425 S.W.3d at 295.

In *Thornton*, this Court held that when the State has proven all the elements of the tampering-with-physical-evidence offense, other than the actual or effective concealment, alteration, or destruction of the evidence, and when the court of appeals has reversed the tampering conviction on legal sufficiency grounds, the judgment should be reformed to reflect a conviction for attempted tampering with physical evidence. *See Thornton*, 425 S.W.3d at 295; *see also Rabb*, 483 S.W.3d at 21–22 (applying *Thornton*). Here, the Court of Appeals refused to reform the judgment to reflect a conviction for attempted tampering with physical evidence because the court held that the State failed to prove David's identity as the person who put the marijuana in the toilet, which would be a necessary element of the lesser-included offense of attempted tampering with physical evidence. *David*, 2021 WL 1345679, at *6 n. 1.

As explained in the State's first ground for review above, which the State here

relies on and adopts, the State presented sufficient evidence to establish David's identity, and thus the Court of Appeals erred in refusing to reform the judgment on this basis. And, even if this Court concludes that the State failed to prove that David effectively altered or destroyed the marijuana, the record still contains legally sufficient evidence to establish the remaining elements of the offense, such that the State proved that David committed attempted tampering with physical evidence. Simply, the evidence was legally sufficient to prove that David, at the very least, tried but failed to alter, destroy, or conceal the marijuana. Thus, if this Court does not reinstate David's conviction for tampering with physical evidence, the Court of Appeals' judgment should nonetheless be reversed, and the case should be remanded to the trial court with instructions to reform the judgment to reflect a conviction for attempted tampering with physical evidence and to hold a punishment hearing pursuant to this post-reformation conviction. *See Thornton*, 425 S.W.3d at 295, 307; *see also Rabb*, 483 S.W.3d at 21–22, 24.

PRAYER

WHEREFORE, the State prays that this petition for discretionary review be granted and that this Court vacate the judgment of the Court of Appeals, hold that legally sufficient evidence supports David's conviction, and remand the case to the Court of Appeals for consideration of David's remaining appellate issues. In the alternative, the State prays that this Court vacate the judgment of the Court of Appeals and remand the case to the trial court to reform the judgment to reflect a conviction for attempted tampering with evidence and to hold a punishment hearing pursuant to this post-reformation conviction.

Respectfully submitted,

YVONNE ROSALES
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34th JUDICIAL DISTRICT

/s/ Justin M. Stevens
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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the statement of facts on page 1 through and including the prayer for relief on page 20, contains 4,491 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Justin M. Stevens
JUSTIN M. STEVENS

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on April 29, 2021, a copy of the foregoing petition for discretionary review was sent by e-mail via the E-serve system to David's attorney, Peter R. Escobar, at escobaroffice_mail@sbcglobal.net.

(2) The undersigned also does hereby certify that on April 29, 2021, a copy of the foregoing petition for discretionary review was sent by e-mail via the E-serve system to the State Prosecuting Attorney at information@SPA.texas.gov.

/s/ Justin M. Stevens
JUSTIN M. STEVENS

APPENDIX

COURT OF APPEALS' OPINION

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

SHOLOMO DAVID,		§	No. 08-18-00059-CR
	Appellant,	§	Appeal from the
v.		§	41st District Court
THE STATE OF TEXAS,		§	of El Paso County, Texas
	Appellee.	§	(TC# 20160D05398)

O P I N I O N

A jury found Appellant Shomolo David guilty of tampering with physical evidence. *See* TEX.PENAL CODE ANN. § 37.09. After David pleaded true to two enhancement paragraphs, the jury assessed punishment at thirty years' in prison. David presents four issues on appeal: (1) there was insufficient evidence to support his conviction; (2) the application paragraph in the jury charge omitted an element of the offense which caused egregious harm; (3) the trial court abused its discretion by denying a motion for new trial based on jury charge error; and (4) ineffective assistance of trial counsel. We agree that the evidence is insufficient and reverse the judgment and render an acquittal.

FACTUAL BACKGROUND

In 2016, Gabriel Nava was working as a special agent in the gang unit of the Criminal Investigations Division ("CID") of the Texas Department of Public Safety. CID received

information that drugs were being sold from a hotel located in a high-crime area in Northeast El Paso. On June 8, 2016, Nava and other CID agents arranged for an undercover buy of crack cocaine at the hotel. Using the information Nava received from that buy, he obtained two "no-knock" warrants to search Hotel Rooms 12 and 15. The next day, on June 9, 2016, with warrants in hand, but before executing them, Nava and a team of law enforcement officers began to surveil Rooms 12 and 15.

During the surveillance, the officers noticed that the suspected drug activity that had been occurring in Rooms 12 and 15 the evening before, had shifted to Room 18. Specifically, they noticed a series of quick transaction exchanges being performed by a female exiting from Room 18, visitors were arriving and quickly departing, and heavy foot traffic coming in and out of the hotel entrance, all of which Nava testified is consistent with narcotic transactions. The officers also witnessed a male arrive and depart Room 18 within two-three minutes, walk across the street and smoke a white rock-like substance with a glass pipe. Faced with this change in circumstance, the team of officers re-grouped and the decision was made to execute the warrants at Rooms 12 and 15 and then attempt a "knock and talk" at Room 18 in which the officers would ask the occupants to come out and talk to the officers.

As the officers drove up to the doors of Rooms 12 and 15, which faced the parking lot, Nava noticed a woman, who was in the process of entering Room 18, look directly at the officers as they approached in their vehicles. The officers were dressed in law enforcement uniforms and gear and were travelling in at least one marked vehicle. As Nava exited his police vehicle from the passenger side, he saw the woman turn toward the interior of Room 18 while the door was still ajar and appeared to yell something to the room's occupants. Nava believed the woman warned

the occupants that police were coming. While the door to Room 18 was still open, Nava announced his presence by yelling "Police, come out. Come this way." After Nava made his announcement of police presence, the door was quickly slammed shut.

As Nava walked past Room 18 on his way to Room 15, he heard movement suggesting there were multiple occupants inside Room 18. He also smelled a strong odor of marijuana coming from inside Room 18. Based on this information, he instructed agents behind him to keep attempting to make contact with the occupants of Room 18. Nava and his team then proceeded to execute the "no-knock" search warrant at Room 15, which was obviously being lived in, but, at the moment, was unoccupied. Nava and his team "cleared" Room 15, but did not search it at that time.

Nava then returned to Room 18, where agents were still trying to make contact with the occupants. Nava believed circumstances justified breaching the room. These circumstances included, but were not limited to, the activity witnessed by the officers earlier that day, the strong odor of marijuana coming from that room, sounds of movement, and his concern for officer safety and that evidence would be destroyed. After forcing themselves inside Room 18, the officers found two women in the living area, Shykeytra Jones and Cierra McFadden, as well as drug paraphernalia in plain view, and the Room had "a very, very strong odor of marijuana." They also heard a third person in the restroom behind a locked door. The officers gave multiple commands to the individual to exit the restroom and could hear movement from inside. After the individual failed to comply, the officers forced the restroom door open and found David fully clothed standing by the toilet.

Inside the toilet, officers found a green leafy substance that Nava testified looked and

smelled like marijuana. Also located in the toilet were small glass pipes used to smoke narcotics. It appeared to officers that someone had tried to flush the items down the toilet. Photographs of the toilet and its contents were taken and introduced into evidence at David's trial. David was arrested and taken into custody, along with the two other occupants of Room 18. All three were charged with tampering with evidence. The hotel had video recording equipment that captured in real time the events described above occurring outside hotel Room 18 and the parking lot. The video footage was introduced into evidence at David's trial.

In addition to the events described above, at David's trial the State introduced evidence regarding the seizure of drugs found in a truck from which David is seen exiting before he entered Room 18. The video footage obtained from the hotel's recording equipment begins with a gray truck parked in front of Room 12. A few minutes before police arrive, David is seen exiting from the driver's side of the truck and walking up toward Room 12, while an individual, later identified as Quentin Jones, remains seated in the front passenger seat. Although David walked out of the field of vision captured by the camera, Nava testified that he believed David tried to make contact with someone in Room 12.

The video then depicts David standing in front of his vehicle with a phone to his ear. A female, later identified as Cierra McFadden, David's niece, exits Room 18 and joins David. David then walks to the passenger side of the truck and opens the door. Jones hands something to David, who hands it to McFadden. Jones remains in the truck while both David and McFadden walk into Room 18. The door to Room 18 is left open. The police officers then arrive and events unfold as described above. The end of video footage depicts Jones exiting the truck from the driver's side. Jones was also later arrested. The duration of the video footage from the moment David exits the

truck through Jones' exit from the truck is approximately four minutes. The entire video footage was introduced into evidence.

In addition, over defense counsel's relevance objection, the State also introduced evidence that a subsequent search of the truck from which David was seen exiting resulted in discovery of crack, crystal meth, and marijuana. Crystal meth and crack were found in a plastic baggie between the center console and the driver's seat. Crystal meth was also found in the cupholder in the center console. Photographs of the drugs confiscated from the truck were admitted into evidence over David's relevance objections.

David did not testify, nor did he present any witnesses or evidence during his case-in-chief. On cross-examination, defense counsel elicited testimony from Nava establishing that because fecal matter was mixed with the contents of the toilet, neither the green leafy substance nor the pipes themselves were retrieved from the toilet or tested. Nava did not deny that the leafy substance was capable of being tested for marijuana if it had been retrieved. Nava also testified that all three occupants at some point could have flushed something down the toilet. Defense counsel established that none of the officers heard the toilet flush prior to entering the restroom, nor did the officers see anyone flushing anything down the toilet.

DISCUSSION

David presents four issues for our review: (1) the evidence is legally insufficient to support the Appellant's conviction under TEX.PENAL CODE ANN. § 37.09; (2) the trial court erred in the jury charge's application paragraph by omitting an element of the offense; (3) the trial court erred in denying the motion for new trial based on jury charge error; and (4) the trial court erred in denying the motion for new trial based on ineffective assistance of counsel. We turn to Appellant's

first point of error.

I. Sufficiency of the Evidence

David argues the evidence is legally insufficient to show he altered, destroyed, or concealed the marijuana; or to show he knew an investigation was pending or in progress; or that he was the individual who placed the marijuana in the toilet.

A. Standard of Review and Applicable Law

When reviewing sufficiency of the evidence, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Griffin v. State*, 491 S.W.3d 771,774 (Tex.Crim.App. 2016); *see Brooks v. State,* 323 S.W.3d 893, 895 (Tex.Crim.App. 2010)(plurality op.)(citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). We resolve any evidentiary inconsistencies in favor of the judgment, keeping in mind that the jury is the exclusive judge of the facts, the credibility of the witnesses, and the weight to give their testimony. *Brooks,* 323 S.W.3d at 899; *see* TEX.CODE CRIM.PROC.ANN. art. 38.04 ("The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony . . . ."). We determine, based upon the cumulative force of all the evidence, whether the necessary inferences made by the jury are reasonable. *Griffin,* 491 S.W.3d at 774.

Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex.Crim.App. 2009); *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997). "'Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the

particular offense for which the defendant was tried.'" *Villarreal*, 286 S.W.3d at 327; *Malik*, 953 S.W.2d at 240.

Here, a hypothetically correct charge authorized by the indictment would instruct the jury to find David guilty of tampering with physical evidence if (1) knowing that an investigation or official proceeding was pending or in progress, and (2) he altered, destroyed, or concealed drugs, and (3) with intent to impair its verity or availability as evidence in the investigation or official proceeding. Alternatively, a jury could find David guilty of tampering with physical evidence if (1) knowing that an offense was committed, and (2) he altered, destroyed, or concealed drugs, and (3) with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense. *See* TEX.PENAL CODE ANN. § 37.09(a)(1); *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex.Crim.App. 2017).

"Alter" is not defined by statute but may be commonly understood to mean "to change; make different; modify." *Williams v. State*, 270 S.W.3d 140, 146 (Tex.Crim.App. 2008)(citing WEBSTER'S UNABRIDGED DICTIONARY, at 52 (2nd ed. 1983)). Recently, in *Stahmann v State*, the Court of Criminal Appeals stated "when a defendant is alleged to have altered a physical thing" then "alter" means "the defendant changed or modified the thing itself[.]" 602 S.W.3d 573, 579 (Tex.Crim.App. 2020). Destroy is defined as "ruined and rendered useless[.]" *Williams*, 270 S.W.3d at 146.

B. Arguments

David challenges the sufficiency of the evidence in that the State failed to prove: (1) he was the individual who placed the marijuana in the toilet; (2) knowing an investigation or official proceeding was in progress or pending; and (3) the marijuana had been altered, destroyed, or

concealed.

David's indictment alleged:

> On or about the 9th day of June, 2016 . . . [David] did then and there knowing that an investigation or official proceeding is pending or in progress alter, destroy or conceal a thing, to wit: drugs, with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding.

First, David claims there was insufficient evidence establishing that *he* took any action to "'. . . alter, destroy(s), or conceal . . .' drugs as alleged in the indictment." He asserts that his mere presence in the restroom is insufficient to prove *he* put the marijuana in the toilet.

The State in closing argued:

> [The marijuana's] in the toilet, ladies and gentlemen, because [David] probably wanted to flush it. And it's in the toilet, making it unavailable to test anymore. . . .
>
> DPS said -- the agent said, 'You know, it looked like there was maybe some fecal matter in the toilet.' That would certainly *alter* a substance, don't you think? Urine would *alter* it. Just a nasty toilet would *alter* it, putting it in the toilet to *destroy* its availability in a subsequent case.
>
> And the cops were investigating that [marijuana] smoke and investigating the fact that there's other drug activity going on, and then the door slams in their face and there's all this commotion. Something was getting *destroyed*. That was that weed in the toilet.
>
> . . .
>
> Just because you didn't catch the defendant red-handed . . . doesn't mean that there's no evidence that he was altering, destroying or concealing that marijuana—those drugs. . . . He *destroyed* those drugs for future use. [Emphasis added].

In rebuttal, the prosecutor continued:

> You see it right here in State's 17, that the—the evidence, the marijuana evidence, the drug paraphernalia, that's already been tampered---that's been tampered with, right? It's been *altered*, all right? Altered, destroyed, concealed where its verity or its availability is no longer.
>
> . . .

> The evidence says, yes, he was tampering. He may not have had a chance to flush it. We may have gotten there too soon; but again, already been tampered with. [Emphasis added].

Taken together, these arguments suggest that the State believed it had proved at the very least that David had *altered* the marijuana by mixing it with feces and urine and attempting to flush it down the toilet to destroy it. The State on appeal asserts, Appellant altered or destroyed the marijuana by mixing it with the urine and fecal matter but does not assert Appellant concealed the marijuana.

C. Analysis

(i) Is the evidence sufficient Appellant altered or destroyed the marijuana?

The thrust of the State's sufficiency argument is Appellant did not open the bathroom door, officers heard movement and shuffling; the door was locked and had to be forced open; Appellant was fully clothed standing between the shower and the toilet. Officer Carrasco testified when he gained entry to the bathroom, he looked in the toilet and observed what appeared to be marijuana in the toilet. Officers declined to collect the marijuana because they asserted it was contaminated with urine and/or fecal matter. However, because it was not collected the marijuana was not tested nor was the toilet water. Appellant, in addition to the two other individuals in the motel room were charged with tampering with evidence.

The State relies on *Diaz* for the proposition that coming from a bathroom in which cocaine was found around the rim of the toilet with flecks of cocaine in the toilet water alone is enough to support a conviction for tampering with evidence. *Diaz v. State,* Nos. 13-13-00067-CR & 13-13-00068-CR, 2014 WL 1266350, at *2 (Tex.App.—Corpus Christi Jan. 23, 2014, no pet.)(mem. op., not designated for publication). However, in that case there were no other occupants of the house and the Appellant told officers he was using the bathroom as they made entry pursuant to a search

warrant. *Id.* at *2-3.

Here we have three individuals who were present, all with access to the bathroom, each had opportunity and access to the toilet and were charged with the offense. Lieutenant Nava conceded under cross-examination that the sound of flushing was not heard, he did not know who of the three arrestees placed the marijuana in the toilet and any of the three could have attempted to flush the toilet. Officer Carrasco stated he did not know why Appellant was in the bathroom or how long the marijuana had been in the toilet before the officers found it.

Again, juxtaposed against the facts at hand, no officer directly observed Appellant place the marijuana in the toilet. Given the premises were rented by two other individuals, who were also charged with tampering with evidence, no evidence was presented as to how long the marijuana had been in the toilet. Further, the fact David had entered the room minutes prior to the police making entry, supports our conclusion the evidence is insufficient that David was the individual who placed the marijuana in the toilet. For the jury to conclude from the evidence David placed the marijuana in the toilet by his mere presence would therefore be an unreasonable inference, amounting to no more than mere speculation. *See Gross v. State*, 380 S.W.3d 181, 188 (Tex.Crim.App. 2012)("Juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculation.").

(ii) Is the evidence sufficient that the marijuana was "altered" or "destroyed"?

Next, the State points to *Gordwin* for support that cocaine flushed down a toilet is altered or destroyed. *Gordwin v. State,* Nos. 01-14-00343-CR & 01-14-00344-CR, 2015 WL 1967623, at *3 (Tex.App.—Houston [1st Dist.] Apr. 30, 2015, pet ref'd)(mem.op., not designated for publication). In *Gordwin*, officers came upon Appellant as he repeatedly flushed the toilet refusing

their commands to stop, resisting as officers pulled him away from the flushing toilet with his hands in the toilet bowl. *Id.* at *1. Here, other than Appellant's presence in the bathroom with a toilet, there is no evidence of any overt act by Appellant to indicate he had placed the marijuana in the toilet. The State also points to *Turner,* which found that an Appellant who was observed swallowing a baggie with a "white or beige rock-like substance" had destroyed evidence. *Turner v. State,* No. 13-12-00335-CR, 2013 WL 1092194, at *1-2 (Tex.App.—Corpus Christi Mar. 14, 2013, no pet.)(mem.op., not designated for publication). Officers directly observed the baggie with the unknown substance in Appellant's mouth when he swallowed it. *Id.*

The State maintains the marijuana had been altered once it had been "wetted-with-toilet-water" mixed with fecal matter that the agents were "unwilling and/or unable to collect." However, given that whether the marijuana was "altered" is a critical, crucial element to whether David tampered with potential evidence, the State failed to present any evidence from any witness or expert demonstrating the toilet water had indeed altered or destroyed the marijuana. We have not uncovered any case that has found marijuana mixed with water, albeit toilet water, has modified the marijuana or rendered it useless. Common sense tells us that water does not necessarily alter everything it touches. While case law demonstrates cocaine is altered by water, it does not automatically follow an unrefined organic material, in its original state, is altered or destroyed by toilet water. The mere assertion that it does cannot support a conviction for tampering with evidence without more. Whether the marijuana can be dried and used is an unanswered question. We cannot simply assume that it is unusable simply because it is repugnant that one would even attempt to do so. Without any evidence the marijuana was altered by immersion in the toilet water, David's conviction cannot stand.

Applying the *Stahmann* definition, the State was required to prove the marijuana was changed or modified. 602 S.W.3d at 579-80. In *Stahmann*, a pill bottle was alleged to have been altered by the act of throwing it over a fence. *Id.* The Court concluded the act of changing its geographic location did not meet the definition of altering the pill bottle itself. *Id.* Here, hypothetically, throwing the pill bottle in a toilet would not "alter" it, likewise, we cannot assume the placement of marijuana in the toilet water "alters" it. The necessary evidence to prove the alteration or destruction of the marijuana was not presented nor proved. The chemical impact of the toilet water upon the marijuana cannot be left to a lay person to infer or assume. It is not uncommon for cell phones to fall into a toilet, yet are successfully retrieved, dried and continue to be used. If one threw dried leaves or twigs in the toilet, have they been "altered" or "destroyed"? Are they altered or destroyed after five minutes in the water, as the case here? It cannot be reasonably inferred or concluded the immersion of the marijuana in toilet water has "altered" or "destroyed" it.

For the foregoing reasons, we conclude the evidence adduced at trial was legally insufficient to support a finding, first, David was the individual that destroyed or altered the marijuana and second, the marijuana was in fact, altered or destroyed.[1] Having sustained David's first issue, accordingly, we do not reach whether he knew an investigation or official proceeding was in progress or pending nor his second, third, or fourth issue.

[1] Under *Thornton v. State*, 425 S.W.3d 289, 295 (Tex.Crim.App. 2014), we are instructed that a reformation of the judgment must be considered regardless whether a party has requested it; it was contested or a lesser-included offense instruction was included in the jury charge instructions. *Thornton* outlined a reformation must be rendered if (1) every element of the lesser-included offense was found by the jury, and (2) the evidence at trial is sufficient to support a conviction of the lesser-included offense. *Id.* at 299-300. Here, even if the evidence supported a finding David intended to alter or destroy the marijuana, but failed, the evidence is legally insufficient to support David was the individual who placed the marijuana in the toilet putting the identity of the offender at issue so an analysis pursuant to *Thornton,* and *Rabb* would be inapplicable. *Id.; Rabb v, State,* 483 S.W.3d 16 (Tex.Crim.App. 2016).

The Court ORDERS Appellant's attorney, pursuant to Rule 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a *pro se* petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX.R.APP.P. 48.4, 68. The Court further ORDERS Appellant's attorney to comply with all the requirements of Rule 48.4.

CONCLUSION

We reverse the judgment finding David guilty of tampering with evidence and render a judgment of acquittal.

April 12, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.
Alley, J., Dissents

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